

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

No. C70-9213
Subproceeding No. 01-1
(Culverts)

PERMANENT INJUNCTION
REGARDING CULVERT
CORRECTION

This matter came before the Court for trial beginning on October 13, 2009, for the purpose of determining the appropriate remedy for the violation by the defendants of certain of the Plaintiff Tribes' rights under treaties between the Tribes and the United States. By amended order dated August 23, 2007, the Court has ruled that the State of Washington has built and currently operates stream culverts that block fish passage to and from the Tribes' usual and accustomed fishing places, depriving the Tribes of the fishing rights reserved in the treaties. The Court has carefully and fully considered the Court's prior rulings in this subproceeding, the evidence presented at the remedy phase trial, the pre-trial and post-trial briefings of the parties, the arguments of counsel and applicable law, and on March 29, 2013 entered Findings of Fact and Conclusions of Law. Based upon the foregoing, it is hereby:

1 Ordered, adjudged and decreed that the State of Washington, the Washington State
 2 Department of Transportation (WSDOT), the Washington State Department of Fisheries and
 3 Wildlife (WDFW), the Washington State Department of Natural Resources (DNR), and the
 4 Washington State Parks and Recreation Commission (State Parks), their agents, officers,
 5 employees, successors in interest, and all persons acting in concert or participation with any of them
 6 (Defendants), are permanently enjoined and restrained to obey, to respect, and to comply with all
 7 rulings of this Court in this subproceeding and with each provision of this injunction, subject only
 8 to such modifications as may be approved by the Court in the future.

10 1. As used in this injunction, the word “culvert” shall mean any structure, other than a full-
 11 span bridge or tide gate, that is constructed to convey water beneath a roadway, and shall also
 12 include associated fishways or other fish passage structures, and bridges built to replace any culvert
 13 that is subject to this injunction. The word “salmon” shall mean any of the six species of
 14 anadromous salmonids of the genus *Oncorhynchus*, commonly known as chinook, chum, coho,
 15 pink, and sockeye salmon, and steelhead.

17 2. Within six months of the date of this injunction, the Defendants, in consultation with the
 18 Plaintiff Tribes and the United States, shall prepare a current list, or lists if different by agency (the
 19 List), of all culverts under state-owned roads within the Case Area existing as of the date of this
 20 injunction, that are salmon barriers. In compiling the List, the Defendants shall use the barrier
 21 assessment methodologies in the Fish Passage Barrier and Surface Water Diversion Screening
 22 Assessment and Prioritization Manual (WDFW 2000) (WDFW Assessment Manual).

24 3. In addition to compiling the List, the Defendants shall make ongoing efforts to assess and
 25 identify culverts under state-owned roads in the Case Area that become partial or full barriers to
 26 salmon passage after the entry of this Injunction, using the WDFW Assessment Manual or any later

1 state barrier assessment standards, provided such standards are consistent with the terms of this
2 injunction.

3 4. Any new culvert constructed by the Defendants in the future on salmon waters within the
4 Case Area and any future construction to provide fish passage at State barrier culverts on such
5 waters shall be done in compliance with the standards set out in this injunction.
6

7 5. By October 31, 2016, WDFW, DNR, and State Parks shall provide fish passage in
8 accordance with the standards set out in this injunction at each barrier culvert on the List located on
9 lands owned or managed by those agencies in the Case Area.

10 6. Within 17 years of the date of this injunction, WSDOT shall provide fish passage in
11 accordance with the standards set out in this injunction at each barrier culvert on the List owned or
12 managed by WSDOT if the barrier culvert has 200 lineal meters or more of salmon habitat
13 upstream to the first natural passage barrier.
14

15 7. WSDOT shall provide fish passage in accordance with the standards set out in this
16 injunction at each culvert on the List having less than 200 lineal meters of upstream salmon habitat
17 at the end of the culvert's useful life, or sooner as part of a highway project, to the extent required
18 by other applicable law.

19 8. Notwithstanding the provisions of paragraph 6, above, WSDOT may defer correction of
20 an aggregation of culverts that cumulatively comprise barriers to no more than 10 % of the total
21 salmon habitat upstream of those WSDOT culverts that would otherwise be subject to correction on
22 the schedule set forth in Paragraph 6, but only upon fulfillment of the following conditions: In
23 consultation with the Plaintiff Tribes and the United States, the Defendants shall develop and
24 complete an assessment of the amount of salmon habitat upstream of each WSDOT barrier culvert
25 on the List for which a "full physical survey," as described in § 3.4 of the WDFW Assessment
26

1 Manual, has not been completed as of the date the List is compiled. In conducting the assessment,
 2 the Defendants shall use the full physical survey methodology or such other methodology as the
 3 parties may agree upon. Each correction deferred by this provision shall be corrected to the
 4 standards of this injunction at the end of the culvert's useful life, or sooner as part of a highway
 5 project, to the extent required by other applicable law. In undertaking the corrections, the
 6 Defendants shall be guided by the principle of providing the greatest fisheries habitat gain at the
 7 earliest time. The Defendants may utilize the "Priority Index" methodology described in the
 8 WDFW Assessment Manual in determining the sequence of correction if they so desire.

10 9. In carrying out their duties under this injunction, the Defendants shall design and build
 11 fish passage at each barrier culvert on the List in order to pass all species of salmon at all life stages
 12 at all flows where the fish would naturally seek passage. In order of preference, fish passage shall
 13 be achieved by (a) avoiding the necessity for the roadway to cross the stream, (b) use of a full span
 14 bridge, (c) use of the "stream simulation" methodology described in *Design of Road Culverts for*
 15 *Fish Passage* (WDFW, 2003) or *Stream Simulation: An Ecological Approach to Providing Passage*
 16 *for Aquatic Organisms at Road-Stream Crossings* (U.S. Forest Service, May 2008), which the
 17 parties to this proceeding have agreed represents best science currently available for designing
 18 culverts that provide fish passage and allow fluvial processes. Nothing in this injunction shall
 19 prevent the Defendants from developing and using designs other than bridges or stream simulation
 20 in the future if the Defendants can demonstrate that those future designs provide equivalent or
 21 better fish passage and fisheries habitat benefits than the designs required in this injunction.

24 10. In rare circumstances, Defendants may deviate from the design standards in paragraph
 25 9, above, if they can establish or the parties agree that use of the standards required in paragraph 9
 26 is not feasible because of: (a) an emergency involving an immediate threat to life, the public,

1 property, or of environmental degradation, and a correction using the required design standards
 2 cannot be implemented in time to forestall that threat; or (b) the existence of extraordinary site
 3 conditions. If a design standard other than that specified in paragraph 9 is used, in addition to
 4 providing the best feasible fish passage at the barrier site, the Defendants shall mitigate for the
 5 impacts of deviating from the standards of this injunction so that the resulting correction plus any
 6 mitigation provides at least the same net benefit to the salmon resource as would have occurred had
 7 the correction applied the required standards.
 8

9 11. The Defendants shall provide fish passage in accordance with the standards set out in
 10 this injunction within a reasonable period of time: (a) when any culvert corrected under the
 11 injunction remains a barrier culvert after attempted correction, or again becomes a barrier culvert
 12 following an initially successful correction, or (b) when any culvert is newly identified as a salmon
 13 barrier culvert after the initial completion of the List.
 14

15 12. The Defendants shall monitor their implementation of the injunction, and evaluate
 16 whether their efforts to provide fish passage at their salmon barrier culverts are effective in meeting
 17 the standards of this injunction. The Defendants shall take reasonable steps to maintain their
 18 culverts in such a manner as to prevent development of fish barriers and to protect salmon habitat.
 19

20 13. The Defendants shall provide the interested Tribes with sufficient notice of State barrier
 21 culvert inventory, identification of previously unidentified State barrier culverts, assessment, and
 22 potential or actual State barrier culvert correction activities to permit the Tribes to monitor and
 23 provide effective recommendations for compliance with the requirements of this injunction.
 24

25 14. The Court shall retain continuing jurisdiction over this subproceeding for a sufficient
 26 period to assure that the Defendants comply with the terms of this injunction.

Respectfully submitted this 29th day of January, 2010.

PLAINTIFF-INTERVENOR TRIBES

By: s/ JOHN C. SLEDD, WSBA # 19270
Attorney for the Hoh, Jamestown S'Klallam,
Lower Elwha Klallam, Nisqually, Port Gamble
S'Klallam, Sauk-Suiattle, Skokomish, Squaxin
Island, Stillaguamish and Suquamish Tribes

By: s/ LAURA SAGOLLA, Admitted *Pro Hac Vice*
Attorney for the Hoh, Jamestown S'Klallam,
Lower Elwha Klallam, Nisqually, Port Gamble
S'Klallam, Sauk-Suiattle, Skokomish, Squaxin
Island, Stillaguamish and Suquamish Tribes

By: s/ ALAN C. STAY, WSBA # 4569
Attorney for the Muckleshoot Indian Tribe

By: s/ MASON D. MORISSET, WSBA # 273
Attorney for The Tulalip Tribes

By: s/ DANIEL A. RAAS, WSBA # 4970
Attorney for the Lummi Nation

By: s/ HARRY L. JOHNSEN, WSBA # 4955
Attorney for the Lummi Nation

By: s/ THOMAS ZEILMAN, WSBA # 28470
Attorney for the Yakama Nation

By: s/ LAUREN P. RASMUSSEN, WSBA #33256
Attorney for the Jamestown S'Klallam and Port Gamble S'Klallam Tribes

By: s/ ALIX FOSTER, WSBA # 4943
Attorney for the Swinomish Indian Tribal Community

By: s/ EDWARD WURTZ, WSBA # 24741
Attorney for the Nooksack Tribe

By: s/ BRIAN GRUBER, WSBA # 32210
Attorney for the Makah Tribe

By: s/ SAMUEL J. STILTNER, WSBA # 7765

1 Attorney for the Puyallup Tribe

2 By: s/ HAROLD CHESNIN, WSBA # 398
3 Attorney for the Upper Skagit Tribe

4 By: s/ O. YALE LEWIS III, WSBA # 33768
5 Attorney for the Quileute Tribe

6 By: s/ ERIC J. NIELSEN, WSBA # 12773
7 Attorney for the Quinault Indian Nation

8 THE UNITED STATES OF AMERICA

9 By: s/ PETER C. MONSON
10 United States Department of Justice

11
12 **ORDER**

13
14 Is it is so ORDERED this 29th day of March 2013.

15
16
17 

18 RICARDO S. MARTINEZ
19 UNITED STATES DISTRICT JUDGE
20
21
22
23
24
25
26